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Chairman:	Mr. Gómez Robledo	(Mexico)
later:	Mr. Ganeson (Vice-Chairman)	(Malaysia)
later:	Mr. Gómez Robledo	(Mexico)

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The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Tajima** (Japan) said, with reference to the draft articles on diplomatic protection adopted on second reading, that the Commission had taken the correct course in not using the genuine-link criterion in determining whether there was a tie of nationality between the injured person and the State exercising diplomatic protection, since the criterion could be difficult to apply in an age when the activities of many corporations and individuals extended over several States. However, the predominant-nationality criterion used in draft article 7 in the case of dual or multiple nationality was not supported by sufficient precedent, and the factors enumerated in the commentary for determining which nationality was predominant might not be decisive.

2. His delegation understood the Commission's purpose in drafting articles on diplomatic protection of stateless persons and refugees, since it was fully aware of the importance of extending protection to such persons. However, since the role of the Commission was to pursue the codification and progressive development of international law, perhaps it should not have the additional burden of proposing articles *de lege ferenda*. In that regard, his delegation was pleased that the Commission had emphasized the discretionary nature of the right of States to exercise diplomatic protection.

3. With regard to the protection of ships' crews, the Commission had rightly stated the difference between the diplomatic protection of crew members by their State of nationality and the right of the State of nationality of a ship to seek redress on behalf of such crew members. However, in an actual case, the wording might cause difficulty when it came to coordinating competing claims.

4. Concerning draft article 19 on recommended practice, his delegation had doubts about the statement in paragraph (3) of the commentary that support was growing for the view that there was some obligation on States to protect their nationals abroad when they were subjected to significant human rights violations. It had concerns about the implication of the clause, which represented neither codification nor progressive development and might change the nature of the draft articles.

5. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), his delegation was pleased that the Commission, in adopting the draft principles on the allocation of loss arising out of hazardous activities, had addressed the issue with maximum generality, in a not overly ambitious way, and had completed its task within the limits of its role of codification and progressive development. It was appropriate for the final outcome to take the form of a set of principles, which should serve as useful guidelines for States dealing with issues related to hazardous activities that had the potential to cause transboundary damage.

6. With regard to the proposal that the Commission should once again take up the topic of most-favoured-nation clauses, it was true that such clauses played a significant role in the economic activities of the international community, and it was regrettable that the General Assembly had taken no action on the draft articles adopted by the Commission in 1978. However, his delegation had some doubts about the wisdom of reopening debate on the topic, since the development of international economic and investment law was progressing well in specific forums.

7. **Mr. Tladi** (South Africa) said that his Government supported the work of the Commission on diplomatic protection, particularly the principle set out in draft article 2 that the right to exercise diplomatic protection under international law was vested in the State. The State was under no obligation in international law to exercise that right, however, and draft article 19 therefore gave cause for concern, particularly in view of the commentary, which invoked the possibility of such an obligation. Although it was couched in non-peremptory language, draft article 19 could give the impression that States were required to exercise diplomatic protection and that the nationals concerned had the right to determine the nature of that protection. He therefore expressed the hope that draft article 19 would be excluded from the set of draft articles, while stressing that it was the consistent practice of his country to respond to legitimate requests for diplomatic protection from its nationals abroad.

8. In connection with chapter V, he said that the draft principles advanced international law, in respect not only of the environment but also of sustainable development. While it might be a departure from a traditional principle of law to hold the operators of hazardous activities not prohibited by law accountable for the attendant risks, it was indeed consistent with the principle of sustainable development and the notion of integration. As for the wide definition of damage to include damage to the environment, his delegation supported it, even though it might entail difficulties in terms of quantification and identification of victims and therefore called for creative solutions. Draft principle 6, which provided a foundation for the enforcement of claims, also required more work, some of which was already reflected in the Special Rapporteur's third report (A/CN.4/566), where various options were considered for preventing multiple claims. He noted, lastly, that the draft principles did not address the important issue of limitation, or even exclusion, of liability of the operator as a consequence of the conduct of the victim or a third party. As was clear from paragraph 30 of the third report, it was not only logical but also generally accepted that the draft principles should provide for such limitation or exclusion, according to the circumstances.

9. **Mr. Márs**ico (Argentina) said that the draft articles on diplomatic protection adopted by the Commission were comprehensive, objective and balanced. The Commission not only had codified the conditions for the exercise of diplomatic protection in accordance with customary practice but also had found correct solutions for some questions of progressive development. In general, his delegation was in agreement with the content of the draft articles. It supported the approach of treating diplomatic protection as one of the traditional means of invoking the responsibility of a State for a wrongful act and hence agreed with the definition of diplomatic protection in draft article 1, which placed the draft articles in the broader context of State responsibility. Draft article 2 captured another fundamental element by reserving to the State of nationality the discretionary power to decide whether and how to exercise diplomatic protection, in keeping with the general aims of its foreign policy.

10. With regard to draft article 5, which dealt with the prerequisite of continuous nationality, the Commission had wisely decided that, if nationality was established both at the date of injury and at the date of the official presentation of the claim, it could be presumed to be continuous between those dates. Argentina also supported the innovative text proposed by the Commission in draft article 8 regarding the extension of diplomatic protection to stateless persons and refugees and considered it a progressive development of international law which was justified in view of the precarious legal status of such persons. The prerequisite of exhaustion of domestic remedies, especially the statement of exceptions to the general rule in draft article 15, was handled well. Lastly, although the concept of "recommended practice" did not, strictly speaking, belong in a set of operative articles, his delegation nonetheless understood the purpose of draft article 19 and supported its inclusion.

11. With regard to the Commission's recommendation that the draft articles should be the basis for the elaboration of a convention, his delegation supported in principle the adoption of a binding instrument. However, it agreed with other delegations on the advisability of taking time for further reflection and the need to link the draft articles with the articles on responsibility of States for internationally wrongful acts.

12. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation considered the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities to be a positive contribution to the development of international law, one that should guide States in the formulation of laws and regulations and in the conclusion of bilateral and multilateral treaties in that area. It should be seen in the context of the other sets of articles on international responsibility, namely, the articles on responsibility of States for internationally wrongful acts and the parallel draft articles still being elaborated on responsibility of international organizations, and, of course, in conjunction with the articles on the prevention of transboundary harm caused by hazardous activities.

13. His delegation was in basic agreement with the conceptual approach and the content of the draft principles, in particular the principle that the innocent victim should not be left to bear the loss from transboundary harm caused by non-prohibited hazardous activities despite preventive measures; the need to preserve and protect the environment; the

obligation of each State to take all necessary measures to ensure prompt and adequate compensation for victims; the primary and strict liability of the operator; non-discriminatory access to redress and remedies; and the establishment of mechanisms such as insurance or funds to finance compensation. Moreover, in the development of specific international regimes, the question of the concurrent or supplementary liability of the State of origin of the hazardous activity and of the harm should be addressed.

14. His delegation agreed with the representative of the Netherlands that the final form of the work should be consistent with the final form of the articles on prevention submitted by the Commission in 2001. It favoured the elaboration of a convention encompassing not only the duty of prevention but also the duty to take measures to ensure compensation for victims of transboundary harm arising out of hazardous activities not prohibited by international law, along the lines of the draft principles.

15. *Mr. Ganeson (Malaysia), Vice-Chairman, took the Chair.*

16. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Sweden and Norway) said that the end result of the Commission's work on diplomatic protection struck a good balance between codification and the progressive development of international law. The Nordic countries were generally pleased with the completed set of draft articles. They supported the approach reflected in draft article 2, based on the premise that States had a right, not a duty, to exercise diplomatic protection. It was also important to underline that the rules of diplomatic protection were without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea.

17. With regard to draft article 5, which made continuity of nationality a requirement for the exercise of diplomatic protection, the Nordic countries supported the approach taken by the Commission whereby a State was entitled to exercise diplomatic protection in respect of a person who had been its national at the time of the injury and was its national at the date of the official presentation of the claim, since the date of the resolution of the claim, a common criterion, was often difficult to determine, and they supported the use of the same solution in draft article 10 with regard to corporations. In addition, the exception in draft article 10, paragraph 3, allowing the exercise of diplomatic protection even if the corporation had ceased to exist, provided that it was as a result of the injury, appeared to be sound. The Nordic countries strongly supported the approach taken by the Commission in draft article 7, whereby, in the case of multiple nationality, the State of nationality that was "predominant", at both the relevant times, should be entitled to exercise diplomatic protection against another State of nationality of the person concerned, considering that it constituted a codification of existing customary international law.

18. The Nordic countries were particularly pleased that the draft articles included a provision on diplomatic protection on behalf of stateless persons and refugees. Draft article 8, paragraph 2, provided that a State could exercise diplomatic protection in respect of a person recognized as a refugee by that State "in accordance with internationally accepted standards". While pleased that the commentary explained that the term "refugee" was not limited to the definitions in the 1951 Convention relating to the Status of Refugees and its Protocol, the Nordic countries would have preferred the even greater flexibility provided by the previous formulation in the commentary whereby a State might extend diplomatic protection to any person that it considered and treated as a refugee, in other words, a person who fulfilled the requirements of territorial connection to the State exercising diplomatic protection and who in the judgement of the State was clearly in need of protection without necessarily being recognized as a refugee according to internationally accepted standards. Moreover, the temporal requirement of lawful and habitual residence at the time of injury and at the date of the official presentation of the claim set too high a threshold. In many cases where there was a need for effective diplomatic protection, the injury would have occurred prior to the entry of the person concerned into the territory of the State exercising diplomatic protection. The Nordic countries would have preferred a criterion of lawful stay, which was used in article 28 of the Convention relating to the Status of Refugees in connection with the issuance of travel documents.

19. With regard to the exercise of diplomatic protection on behalf of shareholders, the Nordic countries were satisfied that the Commission had ensured overall consistency with the case law of the

International Court of Justice, in particular the *Barcelona Traction* case. In draft article 18, the Commission had reaffirmed the very important principle that the right of the flag State to seek redress on behalf of crew members did not exclude the right of the State of nationality of the crew members to exercise diplomatic protection, and vice versa, so that the important protective measures established by the law of the sea were not undermined.

20. The provisions of the new draft article 19 recommending that a State should give due consideration to the possibility of exercising diplomatic protection and should take into account the views of the injured persons appeared to be reasonable and consistent with draft article 2. The recommended practice in paragraph 3, whereby a State should transfer to the injured person any compensation obtained for the injury, subject to reasonable deductions, also seemed fair. Lastly, the Nordic countries believed that the elaboration of a convention on the basis of the draft articles, as recommended by the Commission, could enhance legal clarity and predictability in the field of diplomatic protection.

21. **Mr. Witschel** (Germany) said that the draft articles on diplomatic protection were an important complement to the articles on responsibility of States for internationally wrongful acts, since the rules on diplomatic protection set out one possible legal framework in which such responsibility might be invoked, established and implemented. Since they constituted only one framework among others, draft article 16 rightly made it clear that they did not affect other procedures under international law for securing redress.

22. Germany supported the legal position expressed in draft article 2 that the exercise of diplomatic protection constituted a right, not a duty, of States. The recommendation in draft article 19, subparagraph (a), that States should give due consideration to the possibility of exercising diplomatic protection did not detract from the principle, since it was clearly stated in the commentary that the recommended practices in draft article 19 had not acquired the status of customary rules and were not susceptible to transformation into rules of law in the exercise of progressive development of the law. Even at the national level, where a State might, under its own constitution, be under an obligation to exercise diplomatic protection in favour of its nationals, it still had a wide margin of discretion in deciding how to comply with that obligation.

23. His delegation approved the definition of the State of nationality of a natural person, which was premised on the right of the State to set the conditions for the acquisition and loss of its own nationality and provided a useful but by no means comprehensive list of the ways of acquiring nationality. The Commission had been wise not to include the genuine-link test applied by the International Court of Justice in the *Nottebohm* case, since that case had been exceptional even at the time, and in the current world of migration and globalization to apply the genuine-link test could cause hardship to millions of persons who did not possess the nationality of their host States.

24. On the whole, Germany agreed with the rules adopted by the Commission for the diplomatic protection of legal persons, whereby the State of nationality was the State under whose law the corporation had been incorporated, unless a clearly stated set of conditions applied cumulatively. The decision not to allow the State of nationality of shareholders in a corporation to exercise diplomatic protection had the legitimate aim of avoiding overlapping claims by two or more States. However, his delegation considered that the exceptions to that rule provided for in draft article 11 were too narrow: there might be other situations in which it would be unfair or inappropriate to refuse the State of nationality of a shareholder the right to exercise diplomatic protection, for example, where the State of nationality of the corporation was unable or unwilling to act on behalf of the shareholders.

25. His delegation thought that it would be wise to omit subparagraph (c) of draft article 15, which allowed an exception to the local remedies rule where there had been no relevant connection between the injured person and the State alleged to be responsible at the date of injury. The criterion of "relevant connection" was very vague, and it was doubtful whether the exception was sufficiently established in State practice and case law to be included in the draft articles at the current juncture.

26. With regard to the newly introduced draft article 19 on recommended practice, it was inappropriate to include a set of recommendations in a draft text meant to serve as the basis for the elaboration of a convention intended to regulate the rights of one State vis-à-vis

another State and not the rights of individuals. Draft article 19 in its present form should therefore be deleted. The commentary to the draft article contained a pertinent analysis of the state of the law and of the reasons for change and could be incorporated in the commentary to draft article 2.

27. It appeared that the draft articles were not yet ripe for immediate adoption in the form of a convention. States should be given more time to study the text and comment on it. His delegation would therefore support the proposal that the General Assembly should merely take note of the draft articles at its current session and postpone a decision on how to proceed further to a later date.

28. **Mr. Bellinger** (United States of America) expressed his Government's appreciation for the central role and important contribution of the International Law Commission in the progressive development and codification of international law.

29. His delegation did not consider it advisable to adopt a binding instrument on diplomatic protection, since the draft articles deviated from settled customary international law on only a limited set of issues and did not therefore warrant the holding of an international conference. Those draft articles had only recently become available and Governments needed time to study them more carefully. Pending a fuller review, the United States welcomed the changes made in the draft articles in the past year to reflect customary international law more accurately, together with the clarifications provided by the commentary. It was useful that paragraph (8) of the commentary to draft article 1 made it clear that diplomatic protection did not include demarches or other diplomatic action not involving invocation of the legal responsibility of another State, such as informal requests for corrective action. He expressed satisfaction at the reaffirmation in paragraph (2) of the commentary to draft article 2 that a State was under no obligation to exercise diplomatic protection and that the question of whether to do so was its sovereign prerogative.

30. While it was fitting that the principle of continuity of nationality should be treated in draft articles 5 and 10, and by implication in draft articles 7 and 8, as a prerequisite to the exercise of diplomatic protection on behalf of natural and corporate persons, those draft articles diverged inappropriately from customary international law in not extending that requirement beyond the date of official presentation of the claim to the date of resolution, except in specific cases. The customary international law rule, as most recently articulated in *The Loewen Group Inc. v. United States of America*, was that there must be a continuous national identity from the date of the events giving rise to the claim to the date of resolution of the claim. His delegation welcomed the restatement in draft article 12 of the customary international law rule that a State of nationality of shareholders could exercise diplomatic protection on their behalf when they had suffered direct losses; it did not consider, however, that the two exceptions to the rule set out in draft article 11 reflected customary international law. On the question of exhaustion of local remedies, addressed in draft article 14, his delegation took the position that they did not need to be exhausted in cases where they were futile or manifestly ineffective, and it viewed favourably the stipulation in paragraph (4) of the commentary to draft article 15 (a) that the test was whether the municipal system of the respondent State was reasonably capable of providing effective relief.

31. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities were a positive step towards encouraging States to ensure prompt and adequate compensation for victims of transboundary harm in that they incorporated progressive ideas; it was important to take the necessary measures to put them into effect. It was appropriate that the draft principles should take the form of non-binding standards, as they were innovative and aspirational in character rather than descriptive of current law or State practice. The General Assembly should not take action to convert them into a convention.

32. With regard to the new topics proposed, his delegation commended the Commission and its secretariat for focusing on real-world problems. It hoped that the topic on protection of persons in the event of disasters would be quickly moved to the Commission's agenda for active consideration and that, rather than employ a rights-based approach, the Commission would focus on the development of concrete legal tools. As for the topic on protection of personal data in transborder flow of information, he questioned whether it met the Commission's criteria for consideration, noting that it still raised significant political and policy issues.

33. **Ms. Banks** (New Zealand) said that the strengthening of international law was a plank of New Zealand's foreign policy and that her country strongly supported the work of the Commission. She paid particular tribute to three outgoing Special Rapporteurs and agreed with the suggestion that the question of honorariums for them should be reconsidered.

34. The traditional role of the Commission was changing and would need to continue to be adapted to the challenges of the changing international environment. The Commission should not shy away from innovative working methods and different products for its work, for which it might require increased use of external expertise.

35. The draft articles on diplomatic protection adopted on second reading represented a balanced product which incorporated a mix of codification and sensible progressive development. It was wise to widen the limited exception in draft article 11 (b) to the *Barcelona Traction* rule on the nationality of corporations; that would enable the State of nationality of shareholders to protect them in cases where the requirement to incorporate in a State was a compulsory condition for doing business in that State, even if it was not prescribed by law. She welcomed the clarification in paragraph (9) of the commentary to draft article 1 that diplomatic protection did not include demarches or other diplomatic actions not involving invocation of the legal responsibility of another State, as most allegations of injury through wrongful State action would be resolved via the diplomatic channel and not through the lodging of a formal legal claim. With regard to draft article 19, it was indeed appropriate to recommend that a State exercising diplomatic protection should transfer to its injured national any compensation obtained, subject to reasonable deductions.

36. The topic of international liability in relation to transboundary harm had long been of interest to New Zealand: the risk of such harm from hazardous activities had grown in relevance over the 25 years of the Commission's work and would continue to do so as a result of emerging technologies. Harm was a key issue, but the question also needed to be addressed of who should bear liability for loss in circumstances where, despite prevention measures, loss still occurred. The draft principles struck a reasonable balance between the rights and interests of the operator of the hazardous activity and the State authorizing it, on the one hand, and those of the victims of transboundary harm resulting from such activity, on the other. The principles were general and residual in nature and would help fill a significant gap in the international legal order. She supported the Commission's recommendation that the General Assembly should endorse the draft principles in a separate resolution and that it should urge States to take national and international action to implement them.

37. **Mr. Kessel** (Canada) said that the work of the International Law Commission combined intellectual rigour with profound knowledge and that Canada had benefited greatly from it. His delegation particularly appreciated the attention given by the Special Rapporteur for the topic "Diplomatic protection" to the confusion between diplomatic protection and consular assistance. The distinction between diplomatic and consular functions was an important legal one, but it was no longer always clearly embodied in a structural division between diplomatic and consular services: much consular work was done by diplomats. He hoped that the draft articles would make that distinction clearer.

38. Some confusion had also been created by the terms of draft article 7 in another area of consular law. It had thus been suggested that primary rules of international law, such as those linked to the obligation to notify foreign nationals of their right to contact their consul, should be interpreted in the light of the concept of predominant nationality outlined in that draft article. However, that concept did not lend itself to defining the primary obligation to give consular notice to foreign nationals. It would be useful if the commentary addressed the issue so as to avoid confusion.

39. The draft articles would be extremely useful to the international community in their current form and did not, for the time being, need to be transformed into a treaty.

40. **Mr. Bethlehem** (United Kingdom) said that his country was a strong supporter of the Commission and welcomed the flexibility of its approach as reflected in the final form taken by the products of its work, whether a convention or draft articles, as deemed appropriate. Its work was not incomplete when it did not result in a convention, as had been suggested in some quarters. The articles on State responsibility, for example, had played a very positive role in the development of the law in that area. As for its working

methods, it was appropriate that the Commission's efforts towards the codification and progressive development of international law should be pursued in close consultation with States, cumbersome though that might be.

41. Turning to the draft articles on diplomatic protection, he emphasized that it was a cardinal principle in that regard that the exercise of such protection was a matter for the discretion of the State. His delegation welcomed the inclusion in draft articles 5 and 10 of the presumption of continuity of nationality, which remained rebuttable. In those draft articles there was, however, some inconsistency in the approach with regard to natural persons and legal persons on the question of changes in nationality, which merited further consideration. In respect of draft article 8, his delegation maintained its position that the protection of stateless persons and refugees did not come within the scope of diplomatic protection as currently understood in international law. His Government regarded the provisions of that draft article as *lex ferenda* and, while it might, at its own discretion, take action on behalf of such persons, that would not *stricto sensu* be an exercise of diplomatic protection and would not reflect the status or prospective status of the individual concerned. The reference to draft article 8 in draft article 3, paragraph 2 was likewise not in accordance with customary international law.

42. His delegation welcomed the changes made in draft articles 9 to 13 and agreed with the Commission's commentary that draft article 15 (d) was an exercise in progressive development. As to the new draft article 19, its inclusion was inappropriate, particularly if the draft articles were to be adopted as a convention. There was a risk that the suggestion in draft article 19 (a) that States should give due consideration to the possibility of exercising diplomatic protection could undermine the well-established principle of customary international law that the right to exercise diplomatic protection was purely discretionary.

43. The Commission's recommendation that the draft articles should form the basis for a convention might well open up the debate on the draft articles and thereby jeopardize the important work of consolidation and commentary already undertaken. It would be beneficial for the further development of the law in that area if States were given time to acquaint themselves with the draft articles and draw on them in their current form. Moreover, it would be premature to determine that the draft articles should form the basis of a convention so long as there was no consensus that the articles on the responsibility of States for internationally wrongful acts, to which they were closely related, should be elaborated in treaty form.

44. He welcomed the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission had wisely concluded that the draft principles should be presented in non-binding form as, given their general and residual nature, it would be inappropriate for them to create legal obligations for States. In several respects, they did not represent customary law and were too broadly stated to constitute a desirable direction for *lex ferenda*. Although, in the future, States might have regard to the draft principles when considering issues concerning liability for transboundary harm, the nature of the subject matter was such that States must apply the draft principles in a flexible manner, while bearing in mind the existence of a variety of national legislative systems.

45. **Ms. Goldsmith** (Australia) said that the International Law Commission's considerable achievements over the past year were a testament to its members' dedication, commitment and hard work.

46. The draft articles on diplomatic protection would complement the Commission's work on State responsibility for internationally wrongful acts. The issue of diplomatic protection was of importance to her Government, which was committed to providing appropriate consular services for the large number of Australians who were overseas. While consular assistance was largely preventive, diplomatic protection offered a potential remedy for harm ensuing from an internationally wrongful act.

47. The Commission had brought a welcome contemporary perspective to the topic, which balanced the two components of its mandate, namely the codification and progressive development of international law. On the one hand, the commentary to draft article 4 indicated that the genuine-link requirement established by the International Court of Justice in the *Nottebohm* case needed to be understood in the context of the particular facts of the case and was not more widely applicable. As the commentary to draft article 6 noted, dual or multiple nationality was a

fact of international life. The draft articles reflected that reality.

48. The exercise of diplomatic protection was indeed a right, rather than a duty, of a State. The diplomatic protection of a ship's crew by the flag State was an issue adequately covered by existing international law and there was no need to address it in the draft articles. Draft article 17 was welcome since, in effect, it provided that special rules of international law, including those contained in bilateral or multilateral treaties on the protection of investments, prevailed over the general rules elaborated in the draft articles.

49. It would be preferable not to use the draft articles as the basis for a new convention on diplomatic protection, because their substance might be diminished in the course of negotiations between States. Moreover, the treaty on the subject might not be universally ratified, a situation which would give rise to "reverse codification". As they stood, the draft articles represented a sensible mix of codification and progressive development and were a suitable basis for a General Assembly declaration.

50. The eight draft principles which the Commission had adopted on the allocation of loss in the case of transboundary harm arising out of hazardous activities also combined codification with the progressive development of international environmental law. The Commission had sensibly avoided the difficulties of trying to harmonize national laws and legal systems. States should reflect on the draft principles for a while before a collective stance was taken.

51. **Mr. Kim** Sun Pyo (Republic of Korea) said that one of the crucial functions of a modern State was to protect its nationals abroad. The growth of individuals' activities in the economic, social and cultural fields had brought with it a widening of the span of States' protective action. In addition, the development of international human rights standards had called for the extension of States' protection to non-nationals, such as stateless persons and refugees.

52. While generally endorsing the draft articles on diplomatic protection presented in the seventh report on the subject (A/CN.4/567), he emphasized with respect to draft article 5, paragraph 3, that, on attaining independence, a former colony should be able to exercise diplomatic protection on behalf of its nationals who had been nationals of the former colonial Power, vis-à-vis the latter, with regard to an injury caused by it before independence. That point should be formulated as an exception to the general rule.

53. Concurring with the representative of the United Kingdom that it was a general rule of international law that a State would not support a claim of a dual national against another State of nationality, he drew attention to the fact that confirmation of that rule was to be found in the case law of international courts.

54. With reference to draft article 11, the Special Rapporteur had asserted that the most fundamental principle of the diplomatic protection of corporations was that a corporation was to be protected by the State of nationality and not by the States of nationality of the shareholders in a corporation. That principle had been affirmed by the International Court of Justice in the *Barcelona Traction* case, but the Court's ruling had provoked widespread criticism from many distinguished jurists, including some of the Court's judges, who had held that the shareholders should not have been denied their right under international law. Moreover the jurisprudence of international arbitral tribunals in cases concerning the diplomatic protection of corporations had upheld the right of shareholders in a corporation to request the diplomatic intervention of their own State. Draft article 16, which dealt with actions or procedures other than diplomatic protection, was inappropriate and redundant.

55. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, he commented that, while draft principle 2 reflected the content of recent international treaties on the subject, it was unclear what qualified as "significant damage" and who was to decide that issue. Article I (k) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage as amended by the 1997 Protocol offered a solution in that it laid down that each damage was to be determined by "the law of the competent court". Moreover the notion of "environment" was rather broad, and it therefore raised concerns that it might trigger a flood of claims for damages. It was also unclear whether the liability to be imposed under draft principle 4, paragraph 2, was strict or absolute liability. If strict liability was intended, there was no need to enumerate causes of exoneration.

56. It emerged from draft principle 4, paragraph 5, that States were residual and subsidiary compensators whose responsibility it was to ensure that adequate

compensation was available. Yet States could play an active role in launching space vehicles or running nuclear power plants and could therefore themselves incur liability to pay compensation. Draft principle 6 would not prevent victims from forum shopping, since it allowed the concurrent jurisdiction of the State of origin, the State where the injuries had occurred and the State of nationality of the victims. It might lead to disputes among States, especially when there was considerable discrepancy between the damages which could be awarded.

57. **Mr. Dinescu** (Romania) said that the draft articles on diplomatic protection were broadly in line with the approach advocated by his Government. Draft article 2, read in conjunction with draft article 19, made the exercise of diplomatic protection a right and not an obligation of a State, although the latter was encouraged to avail itself of that right. Such an interpretation constituted substantial progress in the matter. The combination of those two articles offered the best possible solution as it safeguarded the sovereign right of a State to exercise diplomatic protection and took account of the need to keep pace with developments in international practice, which tended to make it incumbent on States to engage in such action.

58. As the commentary to draft article 5, paragraph 2, suggested, it was necessary to guard against a person deliberately changing his or her nationality in order to acquire a State of nationality more willing and able to bring a claim on his or her behalf, if exceptions to the continuous nationality rule were allowed in favour of persons who had the nationality of the claimant State solely on the date of the official presentation of the claim. Draft article 5, paragraph 2, was designed to avoid such a risk. Although it was clear from the commentary that the International Law Commission intended to limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, it was questionable whether the current wording of draft article 5, paragraph 2, supported such a strict limitation. In other words, it was not obvious whether the condition laid down by that paragraph could be equated with the compulsory imposition of a new nationality or whether, on the contrary, it permitted a wider application of the exception. It would be hard to contain the broader application by making it subject to the sole condition that the new nationality had to be acquired for a reason unrelated to the bringing of the claim, since that proviso was subjective in nature, and it would therefore be difficult to prove non-compliance, except in cases of flagrant abuse. Draft article 8 was in keeping with developments in international practice regarding the extension of diplomatic protection to stateless persons and refugees.

59. While his Government was in favour of adopting a convention on diplomatic protection, it also subscribed to the view that some time would be required for an in-depth analysis of the subject so as to permit the adoption of a truly universal legal instrument.

60. As for chapter V, International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities), the Commission's proposal that the General Assembly should adopt a resolution endorsing the eight draft principles on the allocation of loss in the event of transboundary harm arising out of hazardous activities would lay the foundations for closer cooperation among States. To that end, it might be advisable to expressly encourage the conclusion of comprehensive bilateral or regional agreements in that field, rather than agreements on specific categories of hazardous activities, as suggested in draft principle 7.

61. The Commission had rightly concluded that it would be judicious to present articles in the form of draft principles, because such an instrument would not then have to be harmonized with national laws and legal systems, but would nevertheless result in the recognition of certain unanimously accepted objectives, such as the dual need to secure prompt and adequate compensation for victims and to mitigate environmental damage. While the first objective had been a constant concern of the Commission from the outset, the second mirrored the more recent acknowledgment on the part of the international community that environmental protection was of value in itself. Everyone knew that it was vital to balance development requirements against the need to conserve ecosystems, but that was an extremely delicate issue when projects had a transboundary impact with possibly adverse consequences making it necessary to ensure that any victims would receive adequate compensation.

62. The inclusion of environmental protection among the objectives of the draft principles was to be welcomed in the hope that it might prompt States to pay greater heed to the environment. The set of draft principles proposed by the Commission might provide some essential guidance for international practice. They should be duly taken into account in a world where the risks of transboundary harm were proliferating. At the same time, the proposed rules were flexible enough to cater for the diversity of national legal systems. Paragraphs 1 and 2 of draft principle 4 introduced a fair approach ensuring that the operator was liable for paying prompt and adequate compensation to the victim. The operator's liability was predicated on the polluter-pays principle but, at the same time, the State in which hazardous activities took place had to take the necessary measures to give effect to that liability. As the Commission had acknowledged, the aim was to make sure that liability was channelled primarily to the operator without exempting States from their preventive obligations under international law. The adoption of the principle of the operator's objective liability would secure adequate protection of victims.

63. *Mr. Gómez Robledo (Mexico) resumed the Chair.*

64. **Mr. Serrades Tavares** (Portugal) welcomed the completion of the International Law Commission's work on the topics of diplomatic protection, international liability, unilateral acts of States and fragmentation of international law and hoped that it would soon finalize its deliberations on the subjects of shared natural resources and reservations to treaties.

65. Turning to chapter XIII of the report (A/61/10), he said that the topic "Immunity of State officials from foreign criminal jurisdiction" was most appropriate for codification and progressive development. It was doubtful whether the other subjects proposed for consideration by the Commission were ripe for codification, were suitable topics for the Commission, or would add much to work already done. It was necessary to achieve a balance between the desirability of enriching international law and securing a successful outcome of the Commission's studies.

66. As far as the Commission's methods of work and its interaction with the Sixth Committee were concerned, although some practical and highly commendable steps had been taken to revitalize the debate on the Commission's report, the interactive debates with Special Rapporteurs had proved less successful. Chapter III concerning specific issues on which comments would be of particular interest to the Commission tended to deal with peripheral questions. The Commission did not have an opportunity to give adequate consideration to the statements made by Member States in the Sixth Committee. It was therefore all the more urgent that those points should be addressed informally with the Commission and its members. The Commission was like an architect; it had to be allowed some creativity when planning a house, but it could not ignore the wishes of its clients (the States) which would have to live in it. The provision of further opportunities to reflect on means of improving the Commission's relationship with States would therefore be welcome.

67. The institution of diplomatic protection was crucial to contemporary international relations. The draft articles adopted by the Commission offered a suitable basis for an international convention, but their scope should be confined to matters falling within the traditional ambit of diplomatic protection, namely the nationality of claims and the exhaustion of local remedies. Due consideration should, however, have been given to the relationship between functional protection by international organizations of their officials and diplomatic protection, as well as to instances in which a State, or an international organization, administered or controlled a territory. In principle, international organizations should be entitled to exercise diplomatic protection in regard to their employees, but a criterion should be established in order to decide whether priority in exercising that right should be accorded to the international organization or to the State of nationality of the person in question. It would also be advisable to consider the question of diplomatic protection in the context of the administration of a foreign territory or State by another State or an international organization. While the topic of diplomatic protection mainly entailed codification, the areas he had mentioned were ripe for progressive development.

68. The draft articles had rightly encompassed the traditional requirements for the exercise of diplomatic protection: unlawful nature of the act, nationality and exhaustion of local remedies. Similarly, they had established the discretionary nature of the right of a State to exercise diplomatic protection on behalf of its nationals. While draft articles 3 and 8 were welcome,

since they allowed protection to be extended to stateless persons and refugees, the threshold of both lawful and habitual residence set in draft article 8 was too high and could in effect leave individuals unprotected. Further consideration could have been given to the preconditions for the effective exercise of diplomatic protection of stateless persons and refugees, even if that would have entailed progressive development consisting in a departure from the rule that only nationals might benefit from the exercise of diplomatic protection.

69. Draft articles 11 and 12 concerning shareholders as subjects of diplomatic protection were a source of major concern, because a balance had to be struck between the rights of corporations and shareholders, in other words between draft articles 9, 11 and 12. The protection given to shareholders was possibly overgenerous and diverged from existing customary international law. A careful analysis of the articles and their commentaries showed that they had been drafted solely on the basis of the *Barcelona Traction* case and that some of the draft provisions put forward covered matters which the Court had not addressed. The draft articles were therefore proposing innovations rather than progressive development. Should shareholders, whether natural or legal persons, really benefit from special protection over and above that already provided for nationals of States in the other draft articles? It would surely be better to deal with shareholders' protection in specific instruments of international law, such as the bilateral investment treaties to which the Commission had referred. Draft article 17 seemed to accept that premise. The Commission should have promoted a solution more solidly anchored in international law, even if it was aiming at progressive development.

70. Draft article 19 on recommended practice, although innovative, was justified in an area such as the discretionary exercise of diplomatic protection by a State. A more prescriptive formula would have been acceptable.

71. It was to be hoped that the draft articles on diplomatic protection and those on the responsibility of States for internationally wrongful acts — two subjects that traditionally went hand in hand — would soon form parallel conventions. Their adoption would constitute a big step towards the consolidation of the law on international responsibility.

72. Addressing the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. V of the report), he said that, even though the Commission had decided to submit to the General Assembly a draft preamble and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, some core issues deserved further reflection. The topic should be analysed in the light of its own history. The Commission had examined prevention before it had focused on the issue of liability in the case of loss occasioned by transboundary harm. The codification and progressive development of international law should be harmonious and coherent. Liability was just one type of international responsibility. Until more work had been done on the broader topic, it might be unwise to advance too far on liability. Whereas the notion of international responsibility was accepted in legal theory and the obligation to make reparation for unlawful acts was a customary norm, liability for lawful acts tended to be governed by conventional rules.

73. The adoption of the draft principles in a General Assembly resolution would be a positive step towards the introduction of measures securing the prompt and adequate compensation of victims of transboundary harm and of measures ensuring that any potential harm or loss from incidents involving hazardous activities was kept to the minimum. The final text should, however, have taken the form of draft articles, not draft principles.

74. The prevention of transboundary harm and international liability in the case of loss from transboundary harm had been considered under the same main topic of international liability for injurious consequences arising out of acts not prohibited by international law. The two temporal aspects of the topic — prevention, or action before transboundary harm could occur, and loss, or the consequences of such harm — should be given equal status, and the measures adopted to deal with those two aspects should be equally binding. Accordingly, if the set of draft articles on prevention created an obligation for States to avert transboundary harm, it would be logical to impose on States an obligation to take the necessary measures to guarantee prompt and adequate compensation and to minimize any potential harm and loss from incidents involving hazardous activities. If a State violated the latter obligation, it should incur

international liability. Those provisions should be embodied in hard law from the very beginning.

75. If the international community was currently willing to countenance only soft law consisting of a set of principles until more work had been done on the question of State responsibility for unlawful acts, the General Assembly resolution should not contain a convention in disguise. The contents of draft principles 1, 2 and 3 should therefore be re-examined, since they were more typical of an international convention. The contents of draft articles 1 and 3 belonged in the preamble.

76. If the Committee decided to opt for a mere declaration of principles, room must be left for further developments in jurisprudence and doctrine. Any list could be rapidly outdated by technological advances, as had been recognized in the commentaries.

77. The State of origin should assume a larger role in providing compensation for victims (draft principle 4). A shared or subsidiary responsibility to cover costs when the operator or other person or entity was incapable of providing the victim with prompt and adequate compensation would be appropriate, since it would ensure that, if the measures referred to in draft principle 4 proved to be insufficient, the victim would not be left to bear the loss. That was even more important when the victim was in the weaker position and depended on prompt and adequate compensation for its or his survival.

78. For all those reasons, while the adoption of a resolution by the General Assembly would be laudable, it was to be hoped that, one day, it would be possible to arrive at a single convention on international liability for injurious consequences arising out of acts not prohibited by international law, where the responsibility of the State would be established and a proper system of compensation put in place.

79. **Ms. Belliard** (France), referring to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, said that because the concept of a hazardous activity was defined in draft principle 2, paragraph (c), as an activity involving a risk of causing significant harm, it was hardly surprising that the draft principles raised as many questions as they answered. On some points the Commission had discharged its task successfully, as in draft principle 7, paragraph 1, which encouraged cooperation among States by recommending that every effort should be made to conclude specific agreements concerning compensation, response measures and international and domestic remedies. By contrast, in draft principles 5 and 6 more prescriptive language was used, and the notion of compensation was addressed in terms more appropriate to the law on responsibility for internationally wrongful acts.

80. In its work on Guiding Principles relating to unilateral acts of States, the Commission had decided to confine itself to acts "taking the form of formal declarations formulated by a State with the intent to produce obligations under international law". It should perhaps have stated more explicitly that the draft Guiding Principles were not intended to cover all unilateral acts of States. They did have the merit of bringing together, in readily accessible form, elements scattered through the international jurisprudence. Some of the language used, in either the text or the commentaries, might prove difficult to accept, such as the question of arbitrary revocation or the notion that declarations addressed to the international community might contain *erga omnes* undertakings. However, the key point was that the Commission had redrawn the crucial link between the concept of a unilateral act and the expressed intention of a State. In view of the difficulties the Commission had experienced in the past in dealing with the topic, it had wisely chosen to facilitate the codification process by reconvening the open-ended Working Group.

81. She was surprised that the Commission had devoted only three meetings to the report of the Study Group on the question of fragmentation of international law and that it had merely taken note of that report, which had been "finalized" by the Chairman of the Group. The Commission appeared to be acting only as a temporary receptacle for a study conducted outside its remit, the conclusions of which were not to be attributed to it.

82. Turning to the topic of diplomatic protection, she welcomed the adoption on second reading of the draft articles, surely one of the most significant achievements of the Commission over the past five years. A number of improvements had been made to the text on second reading. As the new wording of draft article 1 made clear by defining diplomatic protection as a particular means of invocation by a State of the responsibility of another State, the text now complemented the articles on State responsibility for internationally wrongful acts. She welcomed the

codification of the most obvious features of such an invocation, which was defined in draft articles 2 and 3 as the right of the State of nationality, in accordance with the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case. The draft articles provided useful definitions of the exercise of diplomatic protection, the exhaustion of local remedies and possible exceptions. It was also an exercise in progressive development, allowing for protection by States of legal persons other than corporations.

83. In some respects, however, the draft articles lost sight of their subject matter and ventured into other areas of law: draft articles 8 and 19 seemed to have more to do with the legal protection of human rights than with diplomatic protection properly speaking. Yet the Commission's stated intention in the commentary of confining itself to "rules governing the admissibility of claims" reduced the scope of the draft articles and made them less suitable for solving the problems which tended to arise in contemporary practice in the exercise of diplomatic protection. In the articles dealing with the State of nationality of corporations and their protection, the decision to give priority to the State of the place of incorporation rather than of the seat of the corporation could prove controversial. In that respect, she preferred the version adopted on first reading. Retaining draft article 11, paragraph (b), was likely to cause particular difficulty. Nonetheless, her delegation was in favour of an international convention on the subject of diplomatic protection.

84. **Ms. Pasheniuk** (Ukraine) said that, in spite of the emergence of the human rights system, diplomatic protection of individuals was still of major importance, as shown by recent cases before the International Court of Justice. She welcomed the Commission's efforts to reduce the topic to essential rules and secondary norms. Any other approach, such as defining breaches of substantive law, would have led to insurmountable difficulties. The obligation to exhaust local remedies must be distinguished from the State's obligation to offer access to its courts. Her delegation also agreed with the Commission that neither the Calvo Clause nor the clean-hands doctrine was sufficiently acceptable to be addressed within the present draft articles.

85. A manageable legal regime would best be achieved by focusing, at the present juncture, on the right of States, and States only, to exercise diplomatic protection. However, in future the topic could perhaps be extended to include the right of international organizations to do so, because they were performing an increasing role in international relations, even with regard to the protection of individuals. It should be ensured that the injured individual in whose interest a claim to diplomatic protection was raised would benefit from it. The problem of the relationship between the individual and the State in that context should be given some consideration.

86. Turning to the content of the draft articles, she said that she shared the Commission's approach to the continuous nationality of a natural person, as expressed in draft article 5, paragraph 1. However, the concept of "predominant" nationality in draft article 7 could give rise to some very subjective interpretations. She endorsed in principle the notion of "refugee" in draft article 8, although the definition went far beyond the scope of the provisions of the Convention relating to the Status of Refugees and its Protocol and would require careful consideration to render it compatible with that instrument. Draft article 8 framed a temporal requirement for lawful and habitual residence on the part of a stateless person or a refugee in the State exercising diplomatic protection. However, in many cases where the protection was needed, the injury would have occurred before the person's entry into the territory of the State concerned. She would prefer to substitute the term "permanently resident in that State" for "habitually resident in that State" in draft article 8, paragraphs 1 and 2. In draft article 9, the two separate criteria for corporations — their registered office and their seat of management — would deprive some corporations of diplomatic protection. The link required for legal persons was in conformity with the judgment of the International Court of Justice in the *Barcelona Traction* case, but, contrary to the *Nottebohm* case, no such link was required for natural persons.

87. **Mrs. Daskalopoulou-Livada** (Greece) said that her delegation had consistently supported the idea of the Commission taking up the codification of diplomatic protection. There was now a proliferation of *leges speciales* whereby problems previously addressed through diplomatic protection were increasingly being dealt with by other means.

88. Her delegation broadly supported the Commission's draft. In draft article 9, however, no balance was struck between the two options for determining the nationality of a legal person. The State

under whose law a company was incorporated was given undue priority by comparison with the State where the company's seat of management was located, which had to meet three separate conditions. Clearly, the underlying belief was that the State of the seat would only exceptionally be the State of nationality of a corporation. There was no convincing reason for that approach, and the conditions set for the latter State should be moderated. In draft article 15, too many exceptions were allowed to the rule on the exhaustion of local remedies, and there was a risk they would overlap. The exception in paragraph (e) seemed especially contrived and was difficult to understand. A normative text should be clear and precise and should not require any commentary to be understood.

89. She could see no reason for separate treatment of the subjects covered in draft articles 16 and 17, both of which contained a subsidiarity rule. Draft article 17 merely added a reference to treaty provisions for the protection of investments. The two articles ought to be combined.

90. While agreeing with the general thrust of draft article 18, she had misgivings about the drafting. The Commission's statement, in its commentary, that the right of the flag State could not be categorized as diplomatic protection was questionable. The rule that the flag State, as the State of nationality of a ship, had the right to seek redress on behalf of the crew was well founded in State practice, case law and doctrine and had been supported by the International Tribunal for the Law of the Sea in the *Saiga* case. It did not, however, prevent the ship's crew as individuals from benefiting from the diplomatic protection of their State of nationality if that State wished to offer it. Moreover, as explained in paragraph (9) of the commentary, the flag State would have the right to seek redress for crew members who were illegally arrested and detained following an illegal arrest of the ship itself.

91. She agreed with the recommended practice in draft article 19 for the exercise of diplomatic protection. However, the provisions lacked strength by being non-mandatory in nature, and she would have preferred the Commission to take a bolder approach. Finally, she hoped the draft articles would eventually become a convention, in tandem with those on State responsibility with which they were closely aligned.

92. She expressed satisfaction at the adoption of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. They represented a major contribution in a rapidly evolving field of international law. The clarification in draft principle 2 that a State might also be a victim in the sense of suffering damage was needed mainly for the purpose of compensating damage to the environment, because in most cases only the State or its subdivisions would have the necessary *locus standi* to formulate a claim. The draft principles should, in her view, apply not only to transboundary damage as defined in draft principle 2, paragraph (e), but also to damage to the global commons, at least where the damage arose from response measures undertaken by a State or other entity. It seemed obvious that whichever party bore the cost of response measures should be the recipient of compensation from the polluter's State of origin.

93. Her delegation welcomed the regime of strict liability established by draft principle 4. However, the primacy of the operator's duty to provide compensation was not reflected in draft principle 4, paragraph 2, which provided for it to be imposed on another "person or entity" where appropriate. That would water down the application of the polluter-pays principle, putting it in competition with other options, contrary to recent practice which placed increasing emphasis on the requirement that the polluter should pay. She welcomed the provision in draft principle 5 that a mechanism for channelling liability in accordance with draft principle 4 would not absolve the State of origin from its obligation to take measures to mitigate the damage. In draft principle 7, she felt that the term "particular categories of hazardous activities" should be supplemented by the addition of "and/or specific types of environmental damage". The Kiev Protocol of 2003 applied, not to pre-defined categories of hazardous activities, but to a particular kind of environmental damage, namely, that which affected transboundary wastes.

94. Her delegation strongly believed that the draft principles should form the primary material for a future general convention, provided that a clear definition of "hazardous activities" was adopted.

Agenda item 153: Requests for observer status in the General Assembly (*continued*) (A/C.6/61/L.2-L.4)

Observer status for the OPEC Fund for International Development in the General Assembly (A/C.6/61/L.3)

95. **Mr. Alanazi** (Saudi Arabia) said that the delegations of Mali and Morocco wished to be added to the list of sponsors of the draft resolution.

96. *Draft resolution A/C.6/61/L.3 was adopted.*

Observer status for the Indian Ocean Commission in the General Assembly (A/C.6/61/L.2)

97. **Mr. Soborun** (Mauritius) said that the following delegations wished to be added to the list of sponsors of the draft resolution: Bangladesh, Barbados, Cape Verde, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Dominica, Fiji, Gabon, Guatemala, Guinea, Haiti, Ireland, Liberia, Libyan Arab Jamahiriya, Nauru, Nepal, Rwanda, Saint Lucia, Solomon Islands, Sri Lanka and Swaziland.

98. *Draft resolution A/C.6/61/L.2 was adopted.*

Observer status for the Association of Southeast Asian Nations in the General Assembly (A/C.6/61/L.4)

99. **Ms. Sarne** (Philippines) said that the following delegations wished to be added to the list of sponsors of the draft resolution: Austria, Belgium, Canada, Cyprus, Denmark, Finland, Germany, Italy, Mauritius, Netherlands, Portugal, Republic of Korea, Serbia, Slovenia, Spain and Sweden.

100. *Draft resolution A/C.6/61/L.4 was adopted.*

The meeting rose at 1.05 p.m.